Before the
UNITED STATES COPYRIGHT ROYALTY BOARD
Washington, D.C.

In the Matter of:	)	
	)	
DETERMINATION OF RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (*Phonorecords IV*)	)	**Docket No. 21-CRB-0001-PR (2023-2027)**

SERVICES' MOTION TO COMPEL
THE COPYRIGHT OWNERS TO PRODUCE DOCUMENTS[1]

The Judges should compel the Copyright Owners to produce: (1) documents analyzing sound recording royalty rates; (2) publisher licensing documents; (3) market share information; (4) documents related to unpaid royalties delivered to the MLC; and (5) documents related to songwriter fees, audits, and advances. All these documents directly relate to the Copyright Owners' Written Rebuttal Statement. The Judges should also reject the Copyright Owners' attempt to limit their discovery responses based on the publishers from which they chose to submit testimony on a given topic. The Judges have already held that this limitation is improper, and they should reiterate that holding in compelling the Copyright Owners to provide adequate responses to the Services' rebuttal discovery requests.

[1] The Services bringing this Motion are Amazon, Spotify, Apple, and Pandora. Amazon and Spotify join the Motion in full. Pandora joins the Motion as to Interrogatory Nos. 17-20. Apple joins the Motion to the extent the Requests herein overlap with those Apple served on the Copyright Owners. Specifically, Apple moves with respect to the Requests and Interrogatories discussed in Sections I through V below concerning the following Requests and Interrogatories: Amazon and Spotify Request Nos. 119 (which overlaps with Apple Request No. 53), 95 (which overlaps with Apple Request No. 41), 109 (Apple Request No. 51), 118 (Apple Request No. 52), 11 (Apple Request No. 11), 56 (Apple Request No. 27), 63 (Apple Request No. 31), 67 (Apple Request No. 35), and 69 (Apple Request No. 37) and Interrogatories Nos. 14 and 17-20. True and correct copies of Apple's Requests and the Copyright Owners' responses thereto are attached as Exhibit 1 and 2 of the Declaration of Mary Mazzello, which is being submitted with Apple Inc.'s Motion to Compel the Copyright Owners to Produce Documents.

BACKGROUND

On May 3, 2022, Amazon and Spotify served Requests for Production, and the Services collectively served Interrogatories, on the Copyright Owners[2]. *See* Masterman Decl., Ex. 1 (Amazon and Spotify's Set of Rebuttal Requests for Production of Documents to the Copyright Owners (May 3, 2022)[3]); *id.*, Ex. 2 (Services' Third Set of Interrogatories to the Copyright Owners). The Copyright Owners refused to search for responsive documents for more than 70% of Amazon and Spotify's Requests. *See id.*, Ex. 3 (Copyright Owners' Responses and Objections to the First Set of Rebuttal Requests for Production from Amazon.com Services LLC and Spotify USA Inc. (May 13, 2022)). The Copyright Owners likewise objected to the Services' Interrogatories and generally refused to provide meaningful responses to most of them. *See id.*, Ex. 4 (Copyright Owners' Responses and Objections to the Services' Third Set of Interrogatories (May 13, 2022)).

On May 17, 2022, the Services and the Copyright Owners met and conferred about these issues. *See id,*, Ex. 5 (Email from J. Branson to M. Harris (May 17, 2022)). In subsequent correspondence, the Copyright Owners confirmed that they stood by their objections. *See id.*, Ex. 6 (Email from M. Harris to J. Branson (May 19, 2022)). Thus, the parties are at an impasse. Under the Order Following April 7, 2022 Status Conference, today is the deadline to file rebuttal discovery motions.

[2] The Exhibits ("Ex.") are attached to the accompanying Declaration of Clayton J. Masterman ("Masterman Decl.").

[3] Amazon and Spotify originally served their Requests on May 3, 2022. Amazon and Spotify then made non-material corrections to the Requests on May 16, 2022. That corrected version is being submitted as Exhibit 1.

ARGUMENT

The Copyright Owners must produce any requested documents that are "directly related" to their Written Rebuttal Statement. 37 C.F.R. § 351.5(b)(1). "Documents directly related to a topic that a participant has put 'in issue' or made 'a part of its case' in its written testimony may also be 'directly related' to the [written testimony] and thus discoverable." Discovery Order 9, Order Granting in Part and Denying in Part Services' Omnibus Motion to Compel SoundExchange to Produce Documents, Docket No. 14-CRB-0001-WR (2016-20) at 3 (Jan. 15, 2015). Likewise, the Copyright Owners must respond in full to interrogatories on topics that are "relevant to the claim or defense of any party." 37 C.F.R. § 351.5(b)(2). The Requests and Interrogatories at issue meet those standards.

I. THE COPYRIGHT OWNERS MUST PRODUCE DOCUMENTS AND INFORMATION REGARDING THE EFFECT OF SOUND RECORDING ROYALTIES ON PUBLISHERS AND THE SERVICES (REQUEST NO. 119; INTERROGATORY NO. 14)

Request No. 119 seeks documents in the Copyright Owners' possession concerning the impact of sound recording royalty rates on "the development of the interactive streaming market," the "Mechanical Royalties that Music Publishers are able to negotiate in the interactive streaming market," "the profitability of Music Publishers or the incomes of Songwriters," and "the profitability of Interactive Streaming Services." Masterman Decl., Ex. 1, at 30. These documents relate directly to Dr. Eisenach's Written Rebuttal Testimony, which discusses at length the sound recording royalties that the Services pay and how those royalties should impact the mechanical royalty rates to be set by the Judges. *See, e.g.*, Written Rebuttal Testimony of Jeffrey A. Eisenach ("Eisenach WRT") ¶¶ 189-214 (arguing that the sound recording royalties paid by the Services are not above effectively competitive levels). Dr. Eisenach also presents a

calculation he describes as showing the impact on the Services of total content cost reductions, which he testifies will vary with sound recording royalty rates. *Id.* ¶ 69 & n.110. Documents in which publishers or the NMPA analyze how sound recording royalties operate as a constraint on the mechanical royalties that a willing interactive streaming service would pay, or the mechanical royalties a willing publisher that would accept, are directly related to this testimony.

Similarly, Interrogatory No. 14 asks the Copyright Owners to identify the terms of operative contracts between publishers or songwriters on the one hand, and record labels or recording artists on the other, in which publishers or songwriters agreed to share musical-works royalties with record labels or recording artists (or vice versa for sound-recording royalties). Masterman Decl., Ex. 2, at 7. This Interrogatory seeks information related to a key insight in Professor Lichtman's rebuttal testimony: if existing musical-works royalty rates were too low, labels and artists would likely remedy the shortfall by paying songwriters to create more songs. *See* Written Rebuttal Testimony of Douglas Lichtman ("Lichtman WRT") ¶¶ 45-52; *see also* Amended Written Direct Testimony of Leslie M. Marx ("Marx AWDT") ¶ 147. The presence and magnitude of any such existing payments are relevant to that analysis. Conversely, the absence of such payments would be strong circumstantial evidence that the Copyright Owners' narrative about the compulsory license under-incentivizing songwriting is wrong. *See* Amazon's Rebuttal Introductory Memorandum at 12-13. Professor Lichtman also explains how the ability of publishers and labels to re-allocate royalties among themselves is relevant to, and undermines, the Copyright Owners' Shapley analyses. Lichtman WRT ¶¶ 53-62.

Moreover, as Amazon royalty expert Wayne Coleman testified, there is widespread reporting of songwriters sharing songwriting credit with recording artists to induce the artist to

record a song. *See* Written Direct Testimony of Wayne C. Coleman ("Coleman WDT") ¶ 39; *see also* Lichtman WRT ¶ 47 n.54. Through that practice, songwriters effectively make "side payments" to artists and labels by re-allocating some of their musical-works royalties in order to enable the creation of a sound recording in the first place. This practice bears directly on the market allocation of royalties among musical-works rights holders and sound-recording rights holders, which is at the core of both the Copyright Owners' and Amazon's benchmarking approaches. *Compare* Marx AWDT ¶ 200 ("My benchmark approach utilizes ratios of sound recording to musical works royalty rates, with market power adjustments as appropriate, to derive WBWS all-in musical works rates for interactive streaming services."), *with* Written Direct Testimony of Jeffrey A. Eisenach ¶¶ 81-96 (applying ratios of sound recording to musical works royalty rates to agreements between the Services and record labels).

For all these reasons, Interrogatory No. 14 is "relevant" to both sides' claims and defenses, 37 C.F.R. § 351.5(b)(2), and the Judges should compel the Copyright Owners to provide a substantive response to it.

II. THE COPYRIGHT OWNERS MUST PRODUCE PUBLISHING LICENSING DOCUMENTS (REQUEST NOS. 95, 109, 118)

Requests Nos. 95, 109, and 118 seek documents related to the impact of alleged information asymmetries on licensing negotiations, [redacted] and the use of performance licenses or royalties as leverage in negotiations over mechanical licenses and royalties, respectively. Masterman Decl., Ex. 1, at 25, 28, 30.

Several Copyright Owner rebuttal witnesses discuss these topics. Three witnesses assert that information asymmetry negatively affects the mechanical royalty rates that publishers are

able to negotiate with the Services. *See, e.g.*, Written Rebuttal Testimony of Peter Brodsky ("Brodsky WRT") ¶¶ 4, 7, 17; Written Rebuttal Testimony of David Kokakis ("Kokakis WRT") ¶ 45; Eisenach WRT ¶¶ 109-111. Mr. Kokakis asserts that [redacted] Kokakis WRT ¶ 24. And Mr. Brodsky and Dr. Eisenach both insist that agreements negotiated with the Services are not appropriate benchmarks because they take place under the so-called shadow of a compulsory license (and, by implication, are not voluntary). *See* Brodsky WRT ¶ 78; Eisenach WRT ¶ 108. The Requests are directly related to this testimony, and the Services are entitled to documents to test these assertions.

III. THE COPYRIGHT OWNERS MUST PRODUCE INFORMATION RELATED TO THEIR SHARE OF INTERACTIVE STREAMS (INTERROGATORY NOS. 17, 18, 19, 20)

Interrogatory Nos. 18, 19, and 20 seek related information relevant to several claims that the Services and the Copyright Owners make. Interrogatory No. 17 asks for the "Stream Share for each of [the NMPA's board] members on each Interactive Streaming Service, globally and separately by geographic market." Masterman Decl., Ex. 2, at 8. Although the Services report data to the MLC, [redacted] Written Rebuttal Testimony of Pilar Tschollar ¶ 18; *see also* Written Rebuttal Testimony of James Duffett-Smith ¶ 68 ("Amazon often lacks basic information about ownership splits on the songs it is licensing[.]"). The Copyright Owners have this information.

Interrogatory Nos. 18, 19, and 20 ask the Copyright Owners to state whether they contend that an interactive streaming service could forgo a license from a licensor with a

sufficient stream share. Masterman Decl., Ex. 2, at 8-9. The Interrogatories are all relevant to publisher market power, an issue of central "relevan[ce]" to this proceeding. 37 C.F.R. § 351.5(b)(2). The Copyright Owners refused to answer these Interrogatories, in part because of a professed inability to understand the meaning of "supracompetitive royalty rate." *See* Masterman Decl., Ex. 4, at 15. That objection is baseless. Not only did the Copyright Owners themselves use the term "supra-competitive" in their own Rebuttal Introductory Memorandum (*see* p. 10), but the Copyright Owners *themselves* served interrogatories on the Services seeking the Services' contentions regarding "effective[ ] competit[ion]," which the Services answered in good faith. *See* Masterman Decl., Ex. 7, at 8 (Copyright Owners' Fourth Set of Interrogatories to Each of the Services (May 3, 2022)). The Judges should compel the Copyright Owners to provide substantive responses.

IV. THE COPYRIGHT OWNERS MUST SEARCH FOR AND PRODUCE DOCUMENTS ANALYZING UNPAID ROYALTIES DELIVERED TO THE MLC (REQUEST NO. 11)

Request No. 11 seeks documents "concerning the unpaid royalties that the Services delivered to the MLC in February 2021." Masterman Decl., Ex. 1, at 13. Several of the Copyright Owners' witnesses testified about these royalties and blamed the Services for unmatched funds. Written Rebuttal Testimony of Danielle Aguirre ¶¶ 20-24; Written Rebuttal Testimony of JW Beekman ("Beekman WRT") ¶¶ 56, 60; Written Rebuttal Testimony of Thomas Kelly ("Kelly WRT") ¶¶ 69, 73. The Request directly relates to this testimony, obligating the Copyright Owners to search for responsive documents.

That obligation is not satisfied by the Copyright Owners' insistence, *before* performing *any* search, that no responsive documents exist. The Copyright Owners must actually perform a

"good-faith search" for responsive documents. Order Granting In Part And Denying In Part SoundExchange's Motion To Compel iHeartmedia to Produce Documents at 3, Dkt. No. 14-CRB-0001-WR (2016-2020) (*Web IV*) (Apr. 22, 2015). Because the Copyright Owners refuse to do so, the Judges should compel them.

V. THE COPYRIGHT OWNERS MUST PRODUCE DOCUMENTS RELATED TO SONGWRITER FEES AND AUDITS (REQUEST NOS. 56, 63, 67, 69)

Request Nos. 56, 63, 67, and 69 seek documents that directly relate to the Copyright Owners' Written Rebuttal Testimony about songwriters. *See* Masterman Decl., Ex. 1, at 20-22. The Judges have twice compelled the Copyright Owners to produce songwriter-related documents, because the Copyright Owners put publishers' relationships with songwriters squarely at issue in their direct submission. *See* Order Granting In Part Google's Motion To Compel Documents And Information From Copyright Owners, Dkt. No. 21-CRB-0001-PR (2023-2027) (*Phonorecords IV*) (Apr. 28, 2022) ("Order on Google's Motion to Compel"); Order Granting In Part And Denying In Part Services' Motion To Compel Production Of Documents, Dkt. No. 21-CRB-0001-PR (2023-2027) (*Phonorecords IV*) (May 2, 2022) ("Order on Services' Motion to Compel"). Because the Copyright Owners do the same in their rebuttal submission – and again refuse to live up to their discovery obligations – the same outcome is warranted here.[4]

[4] Amazon and Spotify agree with the Judges that "the issue of songwriter shares of publisher royalty income" and "publisher-songwriter contracts" is "irrelevant" in this proceeding. Order on Google's Motion to Compel at 5; Order on Services' Motion to Compel at 5. But the Copyright Owners rejected the Judges' invitation to withdraw that testimony and instead appear to be doubling down on their songwriter-related arguments. Therefore, the Copyright Owners must produce the documents that they have put in issue and made a part of their case.

Request No. 56 seeks agreements "requiring Songwriters to reimburse expenses paid by Music Publishers" in any *Phonorecords* Proceeding. Masterman Decl., Ex. 1, at 20. The Copyright Owners' witnesses assert that the services they provide to songwriters include incurring the costs of this proceeding for songwriters' benefit. *See* Beekman WRT ¶ 16; Kelly WRT ¶ 22. The Services are entitled to the documents necessary to test that assertion.[5]

Request No. 63 seeks documents sufficient to identify "all audits that resulted in Music Publishers paying Songwriters inappropriately withheld royalties" and the "amounts paid to Songwriters as a result of such audits." Masterman Decl., Ex. 1, at 21. Mr. Beekman asserts that UMPG has created a "sophisticated" royalty management system that ensures accuracy of royalties, such that audits requiring royalty payments to Songwriters are rare. Beekman WRT ¶ 21. Mr. Kelly makes similar claims about Sony's [redacted]. Kelly WRT ¶¶ 29-31. The sought-after documents directly relate to those claims.

Finally, Request Nos. 67 and 69 seek documents demonstrating the [redacted] and "the proportion of currently operative agreements between Music Publishers and Songwriters containing administration or equivalency fees." Masterman Decl., Ex. 1, at 22 (quoting Beekman WRT ¶ 44). One of Mr. Beekman's major critiques of Mr. Coleman's direct testimony about the fees that publisher-songwriter contracts authorize is the

[5] The Copyright Owners' witnesses made similar claims in their Written Direct Testimony regarding infringement actions, but as Mr. Coleman's Written Rebuttal Testimony demonstrated, the Copyright Owners [redacted]. *See* Written Rebuttal Testimony of Wayne Coleman ¶ 23 ([redacted]).

assertion that [redacted]. Beekman WRT ¶ 44. Mr. Beekman likewise asserts that administration fees and equivalency fees are only present in "old legacy contracts from the 1960s and earlier." Beekman WRT ¶ 41. The Services need not accept those assertions at face value and are entitled to the discovery needed to test them. Indeed, documents that the Copyright Owners have produced pursuant to the Judges' May 2, 2022 Order suggest that [redacted]. *See* Masterman Decl., Ex. 8 (P4-UMPG000095008, [redacted]).

VI. THE COPYRIGHT OWNERS MUST SEARCH THE FILES OF NMPA BOARD MEMBER PUBLISHERS FOR RESPONSIVE DOCUMENTS (REQUEST NOS. 79, 86, 87)

For Request Nos. 79, 86, and 87, the Copyright Owners have agreed to conduct searches, but only of the files of a single publisher. Masterman Decl., Ex. 3, at 39-40, 42-43. The Copyright Owners claim that because these Requests address topics that a particular publisher's witness put at issue, the Services may obtain discovery only from that specific publisher. The Judges have already rejected that very limitation in this proceeding. *See* Order on Services' Motion to Compel at 4 ("Copyright Owners improperly narrowed their responses. Even though only one UMPG witness testified regarding the value of catalog acquisitions, that does not mean other publishers would not or do not have documents relating to their own acquisition of catalogs."). In doing so, the Judges applied their longstanding holding that a trade association

participant like the NMPA cannot cherry pick "[publisher]-specific material upon which they intend to rely . . . and then limit discovery from any other [publisher]."[6]

It is reasonable to expect that multiple publishers will have documents responsive to these Requests.[7] Request No. 79 seeks documents "in which any of [the NMPA's board] members, including [Sony], inquired about, analyzed, estimated, projected, or otherwise discussed 'the amount of Prime Music revenues [or] the number of Prime Music users.'" Masterman Decl., Ex. 1, at 23 (quoting Brodsky WRT ¶ 17). Request No. 86 seeks documents "concerning [redacted]" *Id.* at 24 (quoting Written Rebuttal Testimony of Timothy Cohan ("Cohan WRT") ¶ 8). And Request No. 87 seeks documents concerning "the possibility of a 'potential legal challenge' to [redacted] under the Phonorecords III Original Determination." *Id.* at 24 (quoting Cohan WRT ¶ 11). Each of these Requests is based on the testimony of a witness employed by a particular publisher, but "that does not mean other publishers would not or do not have documents relating to" these topics. Order on Services' Motion to Compel at 4.

[6] Order Granting in Part and Denying in Part Services' Motion to Set Specific Discovery Deadlines and Compel Copyright Owner Participants' Adherence to Their Discovery Obligations at 7, Dkt. No. 16-CRB-0001 SR/PSSR (2018-2022) (*SDARS III*) (Aug. 23, 2016) ("*SDARS III* Order on Discovery"). As the Judges explained, an alternative rule "would tilt the informational playing field, preventing the Services from presenting evidence" to rebut the Copyright Owners' preferred narrative. *Id.*

[7] The same can be said for Request Nos. 35 and 45, which are addressed in a separate motion. *See* Amazon and Spotify's Motion to Compel the Copyright Owners to Produce Documents About Their New Rebuttal Benchmarks (May 24, 2022).

Because multiple publishers may have documents responsive to Request Nos. 79, 86, and 87, the Copyright Owners should be compelled to search the files of NMPA board member publishers generally, not simply the sole publisher of their choice.[8]

[8] Although entitled to searches of all publishers whose executives sit on the NMPA's Board of Directors, *see SDARS III* Order on Discovery at 5-9, Amazon and Spotify in the interest of compromise have agreed to accept searches from a narrower set of publishers (Sony, UMPG, Warner Chappell, peermusic, Kobalt, and BMG) with respect to U.S.-market-related discovery. *See* Masterman Decl., Ex. 9 (Email from J. Branson to M. Harris (May 20, 2022)).

CONCLUSION

The Judges should grant the Motion.

Dated: May 24, 2022

Respectfully submitted,

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Before the
UNITED STATES COPYRIGHT ROYALTY BOARD
Washington, D.C.

In the Matter of:	)	
	)	
DETERMINATION OF RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (*Phonorecords IV*)	)	**Docket No. 21-CRB-0001-PR (2023-2027)**
	)	
	)	
	)	

DECLARATION OF CLAYTON J. MASTERMAN

(On Behalf of Amazon.com Services LLC)

1. I am an associate at Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., counsel for Amazon in the above-captioned proceeding.

2. I respectfully submit this declaration in connection with Services' Motion to Compel the Copyright Owners to Produce Documents, and Amazon's Motion to Compel the Copyright Owners to Comply with Production Commitments. I am authorized by Amazon to submit this declaration, and I am fully familiar with the facts and circumstances set forth herein.

3. Attached as Exhibit 1 to this Declaration is a true and correct copy of Amazon and Spotify's Set of Rebuttal Requests for Production of Documents to the Copyright Owners (May 3, 2022). Amazon and Spotify made non-material corrections to the RFPs on May 16, 2022. Amazon and Spotify originally served their RFPs on May 3, 2022.

4. Attached as Exhibit 2 to this Declaration is a true and correct copy of Services' Third Set of Interrogatories to the Copyright Owners (May 3, 2022).

5. Attached as Exhibit 3 to this Declaration is a true and correct copy of Copyright Owners' Responses and Objections to the First Set of Rebuttal Requests for Production from Amazon.com Services LLC and Spotify USA Inc. (May 13, 2022).

6. Attached as Exhibit 4 to this Declaration is a true and correct copy of Copyright Owners' Responses and Objections to the Services' Third Set of Interrogatories (May 13, 2022).

7. Attached as Exhibit 5 to this Declaration is a true and correct copy of Email from J. Branson to M. Harris (May 17, 2022).

8. Attached as Exhibit 6 to this Declaration is a true and correct copy of Email from M. Harris to J. Branson (May 19, 2022).

9. Attached as Exhibit 7 to this Declaration is a true and correct copy of Copyright Owners' Fourth Set of Interrogatories to Each of the Services (May 3, 2022).

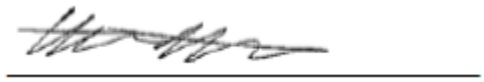
10. Attached as Exhibit 8 to this Declaration is a true and correct copy of a document Bates stamped P4-UMPG000095008, [redacted].

11. Attached as Exhibit 9 to this Declaration is a true and correct copy of Email from J. Branson to M. Harris (May 20, 2022).

12. Attached as Exhibit 10 to this Declaration is a true and correct copy of Email from C. Young to Copyright Owners (May 23, 2022).

Pursuant to 28 U.S.C. § 1746, I hereby declare under the penalty of perjury that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Dated: May 24, 2022
Washington, D.C.



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Exhibits 1-10

Restricted – Subject to Protective Order in
Docket No. 21-CRB-0001-PR (2023-2027)
(Phonorecords IV)

Omitted from Public Version

Proof of Delivery

I hereby certify that on Tuesday, May 24, 2022, I provided a true and correct copy of the Services' Motion to Compel the Copyright Owners to Produce Documents (PUBLIC) to the following:

Google LLC, represented by Gary R Greenstein, served via E-Service at ggreenstein@wsgr.com

Powell, David, represented by David Powell, served via E-Service at davidpowell008@yahoo.com

Apple Inc., represented by Mary C Mazzello, served via E-Service at mary.mazzello@kirkland.com

Copyright Owners, represented by Benjamin K Semel, served via E-Service at Bsemel@pryorcashman.com

Johnson, George, represented by George D Johnson, served via E-Service at george@georgejohnson.com

Joint Record Company Participants, represented by Susan Chertkof, served via E-Service at susan.chertkof@riaa.com

Warner Music Group Corp., represented by Steven R. Englund, served via E-Service at senglund@jenner.com

Zisk, Brian, represented by Brian Zisk, served via E-Service at brianzisk@gmail.com

UMG Recordings, Inc., represented by Steven R. Englund, served via E-Service at senglund@jenner.com

Sony Music Entertainment, represented by Steven R. Englund, served via E-Service at senglund@jenner.com

Signed: /s/ Joshua D Branson